

A SIMON SAVARIMUTHU THEVARAJAH v. PP

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
HARMINDAR SINGH DHALIWAL JCA
STEPHEN CHUNG JCA

B [CRIMINAL APPEAL NO: B-05(M)-528-11-2017]
29 JULY 2019

C **CRIMINAL LAW:** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking – Accused convicted for offence of trafficking in dangerous drugs and sentenced to death – Whether elements of trafficking fulfilled – Whether defence of innocent carrier probable – Whether conviction and sentence safe*

D **CRIMINAL PROCEDURE:** *Appeal – Appeal against conviction and sentence – Accused convicted for offence of trafficking in dangerous drugs and sentenced to death – Drugs found in box sent by courier service – Whether accused had custody and control of box – Whether accused had knowledge and possession of drugs found in box – Whether elements of trafficking proved – Whether there were several competing inferences – Whether there was inference in favour of accused – Whether accused's defence probable – Whether bare denial – Whether conviction and sentence safe – Dangerous Drugs Act 1952, s. 39B(1)(a)*

E **EVIDENCE:** *Adverse inference – Non-calling of material witness – Accused charged for offence of trafficking in dangerous drugs – Drugs found in box sent by courier service – Information on drugs received from manager of courier service – Whether informer material witness to prosecution's case – Whether non-calling of informer created gap in prosecution's case – Whether failure to call informer detrimental to prosecution's case – Whether adverse inference ought to be drawn against prosecution – Evidence Act 1950, s. 114(g)*

G Police officer SP8 received a call from one Mr Ong, the manager of a courier service company, regarding a box which he suspected to contain dangerous drugs, to be delivered to an apartment. Acting upon this information, SP8 instructed undercover police SP7 to deliver the box and to arrest the person. SP7, in turn, instructed SP6 to act as a delivery man to accompany the courier driver ('SP5') to deliver the box. SP7 and his team, who waited in front of the apartment, saw the appellant coming out to collect the box from the courier van. When the team approached the appellant and introduced themselves as police officers, the appellant let go of the box and tried to run away but was successfully apprehended by the police. The box, which had an airway bill signed by the appellant, was found to contain substances which were later confirmed as 1,498g of methamphetamine. The appellant was charged at the High Court for trafficking in dangerous drugs, an offence under
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I s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). The trial judge, in ruling that the appellant had custody and control of the box, and following that knowledge and possession of the drugs, relied on the following evidence

(i) SP5 telephoned the appellant to collect the box and it was the appellant who collected the same; (ii) SP6 delivered the box to the appellant who confirmed that the name stated on the box was his name and acknowledged receipt of the box by signing on the delivery bill; and (iii) SP7 said the appellant looked shocked and let go of the box and tried to run away when the team identified themselves as the police. The trial judge further opined that based on the weight of the drugs, namely 1,498g of methamphetamine, which was not for self-consumption, there was an irresistible inference that it was for the purpose of trafficking. Satisfied that the prosecution had established a *prima facie* case, the trial judge called the appellant to enter his defence. In his defence, the appellant submitted that (i) he had an online business which dealt with bicycle parts; (ii) on the day of the arrest, he received a call to collect the box at the apartment; (iii) when he asked the caller as to why the box was not sent to his home address, the appellant was told that that was the address given to them; and (iv) he did not know about the drugs and was only helping his friend who (a) lived at the apartment; (b) also dealt with bicycle parts; and (c) had ordered bicycle seats under the appellant's name. At the conclusion of the trial, the trial judge rejected the defence as bare denial and convicted the appellant for the offence and sentenced him to death. Hence, the present appeal. In support of his appeal, the appellant submitted that: (i) he was merely an innocent carrier and he did not have custody, care, control and/or possession of the drugs in the box; (ii) he did not know the box contained drugs and only signed the airway bill and accepted the box based on the shipping details that it contained bicycle parts; (iii) he was not given the opportunity to open and inspect the contents of the box before signing the same and he was immediately arrested after he accepted the delivery of the box; and (iv) adverse inference ought to have been drawn against the prosecution for the failure to call the key and material witness, Mr Ong, who gave the information about the box. Failure to do so created a gap in the prosecution's case.

Held (allowing appeal)

Per Stephen Chung JCA delivering the judgment of the court:

- (1) Mr Ong was a material witness and the police should have required him to enter into a bond or served a subpoena on him to appear as a witness but only decided to trace him in the midst of the prosecution's case. No explanation was given as to why the police could not do so earlier. SP7 testified that he opened the box at the police station and found several bicycle seats. Upon inspection, he found that the tapes on the plastic wrappings of these saddle seats had been opened or broken, the packets of drugs were concealed under the seats and the plastic wrappings were retaped. No evidence was adduced as to who did it. Therefore, Mr Ong, as the person who received the box and alerted SP8 about the drugs, was a material witness and a vital link to the prosecution's case and should have been called to explain. (paras 31 & 32)

- A (2) A statement was recorded from Mr Ong during investigation. After failing to contact Mr Ong in the midst of the trial, the prosecution should, but chose not to, produce Mr Ong's statement as evidence. The trial judge did not deal with these issues although they were raised before him. In not calling Mr Ong to testify, there were gaps and doubts in the
- B prosecution's case against the appellant and adverse inference should have been invoked against the prosecution under s. 114(g) of the Evidence Act 1950. The trial judge failed to appreciate the evidence adduced and had misdirected himself on the evidence. (paras 31 & 33)
- C (3) The policemen who carried out the operation to deliver the box and to arrest the appellant, were not in police uniform. SP7's perception of the appellant's facial expression looking shocked could be very subjective. To the appellant, the men who approached him were not in uniform and were complete strangers. It was natural for the appellant to react, struggle and to try to run, not knowing their intentions. These actions
- D happened very fast; in the blink of an eye. Several inferences could be made from the facts, one of which was that he looked shocked and, in trying to run away, he had a guilty mind. However, it could also be inferred that he was trying to flee from a group of strangers who approached him. The appellant looking shocked and trying to flee did
- E not necessarily lead to the irresistible inference that he had knowledge of the drugs. (paras 35 & 36)
- F (4) The appellant could not be said to be in physical possession of the box. He never had access to the box. He was handed the box by SP6. The trial judge erred in finding that the appellant had physical possession or custody of the box. This then raised the question whether the appellant knew of the contents of the box since the prosecution did not lead any direct evidence that the appellant had ordered the bicycle parts and was the owner of the box and its contents. The box was taped and sent from China to the courier company in Malaysia for delivery. At the time the
- G box was delivered to the appellant and when he was arrested, the appellant was not given a chance or opportunity to open and examine the contents of the box. There was no evidence that the appellant had suspicions but deliberately shut his eyes. (paras 38 & 39)
- H (5) Where several inferences could be drawn from the proved facts and one inference which could be drawn in favour of the appellant, any benefit of doubt from that inference must be given to the appellant. The trial judge erred in drawing the inference that the appellant had knowledge of the drugs in the box and that he was in possession of the drugs. It was not safe to convict the appellant. The order of conviction and sentence of the High Court was set aside. The appellant was acquitted and
- I discharged. (paras 3 & 40)

Case(s) referred to:

- Agbu Goodluck Ugochukwu lwn. PP [2018] 2 CLJ 30 CA (refd)*
Chan Pean Leong v. PP [1956] 1 LNS 17 HC (refd)
Fakhrurrazi Hasan v. PP [2017] 2 CLJ 125 FC (refd)
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC (refd)
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC (refd)
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC (refd)
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC (refd)
PP v. Lam Peng Hoa & Anor [1996] 3 CLJ 74 HC (refd)
PP v. Lee Jun Ho & Ors [2011] 6 MLJ 220 (refd)
PP v. Tan Tatt Eek [2005] 4 CLJ 460 FC (refd)
Raman Kunjiraman v. PP [2014] 9 CLJ 915 FC (refd)
Sim Tiew Bee v. PP [1973] 1 LNS 138 FC (refd)
Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356 (refd)

Legislation referred to:

- Dangerous Drugs Act 1952, ss. 2, 37(d), (da), 39B(1)(a), (2)
 Evidence Act 1950, ss. 8, 9, 32, 114(g)

For the appellant - Gabriel Susayan & Shalvin Kanvinchevan; M/s Gerard Lazarus & Assocs

For the respondent - Ku Hayati Ku Haron; DPP

[Editor's note: Appeal from High Court, Shah Alam; Criminal Trial No: 45A-35-04-2015 (overruled).]

Reported by Najib Tamby

JUDGMENT**Stephen Chung JCA:****The Appeal**

[1] The appellant was charged for trafficking of drugs as follows:

Bahawa kamu pada 3 November 2014, jam lebih kurang 2.00 petang, bertempat di tepi jalan di hadapan Mentari Court Apartment, Jalan PJS 8/9, Taman Seri Mentari, Petaling Jaya, di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan telah mengedar dadah berbahaya iaitu Methamphetamine seberat 1498.0 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] After a trial in the High Court, the appellant was convicted and sentenced to death under sub-ss. 39B(1)(a) and 39B(2) of the Dangerous Drugs Act 1952 (DDA). The appellant appealed against the conviction and sentence.

[3] At the end of the appeal, we allowed the appeal, set aside the order of the High Court and acquitted and discharged the appellant under the charge. We now give our grounds as follows.

A Brief Facts

[4] On 3 November 2014 at about 10am, SP8 (a police officer) received a phone call from a Mr Ong Poh Yee (Mr Ong), a manager of a courier service company SF Global Express, regarding one box, which he suspected to contain dangerous drugs, and to be delivered to an address at Mentari Court Apartment, Petaling Jaya. On receiving the information, SP8 instructed SP7 to carry out an operation as undercover police to deliver the box and to arrest the person. SP7 instructed SP6 to act as a delivery man to accompany the courier driver (SP5) from SF Global Express to deliver the box.

[5] On same day, at about 2pm, as part of the operation, SP7 and his team waited in front of Mentari Court and saw the courier delivery van stopped in front of the apartment and an Indian male came and collected a box from the van which was handed over by SP6. SP7 and his team approached the Indian male and identified themselves as police officers. The Indian male person let go of the box and tried to run away but was apprehended by the police. This person was identified as the appellant in this appeal.

[6] The box had Chinese language writing and two pieces of airway bill number 902042715158. One airway bill with the appellant's signature was retrieved from the floor. The appellant and the box (P11) were brought to IPD Petaling Jaya. Inside the box, SP7 found four transparent plastic packets containing crystalline substance concealed in the bicycle seats. The police then searched the appellant's house at Subang Jaya but did not find any incriminating item in the house.

[7] The crystalline substance was sent to the chemistry department for analysis. SP1 carried out the analysis and confirmed that it contained methamphetamine weighing 1498g.

In The High Court

[8] The learned judge referred to the following evidence in ruling that the appellant had custody and control of the box:

- (i) SP5 telephoned the appellant to collect the box and the appellant was the one who collected the box;
- (ii) SP6 had delivered the box to the appellant who confirmed that the name stated on the box was his name and acknowledged receipt of the box by signing on the delivery bill; and
- (iii) SP7 said the appellant looked shocked and let go of the box when the police identified themselves as police and the appellant tried to run but was apprehended.

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[9] The learned judge referred to the appellant's conduct in releasing the box after SP7 identified themselves as police and tried to escape and there was a scuffle before he was arrested. He said the appellant also looked shocked when SP7 introduced themselves. The learned judge referred to s. 8 of the Evidence Act 1950 (EA) and that based on the appellant's conduct, it pointed to the fact that the appellant knew that the box contained dangerous drugs. The learned judge then ruled that the prosecution had proven the element of knowledge and that the appellant was in possession of the drugs.

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[10] On trafficking, the learned judge was satisfied that based on the evidence that the appellant was carrying and concealing the drugs inside the box, it amounted to trafficking as defined under s. 2 of DDA. He said based on the weight of the drugs, namely 1,498g of methamphetamine, they were not for self-consumption, and there was the irresistible inference that it was for the purpose of trafficking. The learned judge found that the prosecution had made out a *prima facie* case against the appellant and called on him to enter defence.

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[11] The appellant testified that he had an online business in dealing with bicycle parts. On the day he was arrested, he received a call to collect the box which he ordered to be collected from Mentari Court. He inquired from the caller why the box was not sent to his home address and was informed that the address was given to them so the appellant had to collect the box from there. After he was arrested and the drugs were found, he told the police he did not know about the drugs and was only helping a friend by the name Steven who lived in Mentari Court who also deals in bicycle parts. He said it was Steven who ordered the bicycle seats under his (the appellant's) name.

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[12] After hearing the defence, the learned judge ruled that it was of recent invention and a bare denial. He said the evidence given by SP5, SP6 and SP7 was relevant and reliable and there was no reason for them to frame the appellant. The learned judge pointed out that the appellant did not put to the prosecution's witnesses why the box was not sent to his address and never raised the existence of Steven, which was an afterthought because Steven was never called. He said it was inherently improbable for the appellant, who had just known Steven, to have helped Steven to place the order when Steven himself was able to do so. The learned judge therefore convicted and sentenced the appellant accordingly.

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The Appellant's Case

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[13] The appellant submitted that he did not have custody, care, control and/or possession of the drugs found in the box because the box which was sent from China to the courier company and handed to him in front of Mentari Court was only opened in the police station and that he did not know of the drugs inside the box which was confirmed by SP9. It was submitted that he was merely an innocent carrier.

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A [14] It was submitted that he agreed to sign the airway bill and accepted the box based on the shipping details on the box that it only contained bicycle parts. It was submitted that he was not given the opportunity to open and inspect the contents before he signed and he was immediately arrested after he took delivery of the box. It was submitted that he did not know of the drugs in the box.

B [15] The appellant submitted that an adverse inference under s. 114(g) of EA should be drawn against the prosecution for failing to call Mr Ong as a witness as he was the one who gave the information to SP8 that the box contained drugs. It was submitted that Mr Ong was a key and material witness who should be called to explain how, why and when he knew of the contents of the box which was in his custody and whether there was any tampering by Mr Ong himself. It was submitted that the police had recorded a statement from Mr Ong but failed to produce it in court which led to the inference that the police tried to hide something.

D [16] It was submitted that all overseas boxes sent *via* courier would have been scanned or inspected by the customs department but the prosecution failed to call anyone from customs. It was submitted that there existed a gap in the prosecution's case and the failure to do so had prejudiced the defence. It was submitted that there were doubts raised and that the prosecution had failed to prove its case beyond reasonable doubt against the appellant.

E [17] The appellant submitted that the learned judge failed to give sufficient weight to the defence that the box was sent to Steven at Mentari Court and that at the earliest opportunity the appellant had raised this but the police failed to investigate who stayed there. It was submitted that Steven was the real trafficker and that the learned judge failed to appreciate this piece of evidence.

Case For The Respondent

G [18] It was submitted that based on the facts adduced by the prosecution, it was clear that the appellant had custody and control of the box which contained the drugs taking into account that the box was addressed to the appellant and he signed and took delivery of the box as the recipient.

H [19] The appellant submitted that knowledge of the drugs could be inferred from the conduct demonstrated by the appellant in letting go of the box when the police introduced themselves and that the appellant tried to run away. It was submitted that the appellant's conduct pointed to his guilty mind without the need to rely on any statutory presumption. It was submitted that the learned judge had made a correct finding of fact that the appellant had knowledge of the drugs inside the box.

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[20] It was submitted that the act of the appellant carrying the box which contained the drugs when he was arrested fell squarely under s. 2 of DDA that the appellant was trafficking the drugs. It was submitted that the learned judge was not wrong to invoke both the act of carrying and concealing at the same time while making the finding of trafficking.

[21] The respondent submitted that the learned judge had given due consideration to the defence raised including the man named “Steven” and that the appellant was an innocent carrier. It was submitted that the existence of Steven was never raised during the prosecution’s case. It was submitted that it was correct for the learned judge to reject the defence of innocent carrier and that the appellant failed to raise any reasonable doubt on the prosecution’s case.

Our Decision

[22] Before us, we were referred to the testimonies of the witnesses and the exhibits. Based on these and the submissions made, our concern was whether it was safe to convict the appellant. Our concern revolved around the issues of whether the appellant was in possession of the drugs, namely, was he in physical possession of the drugs and whether he knew that there were drugs inside the box delivered to him by an undercover policeman (SP6) in front of Mentari Court.

[23] On the evidence before him, the learned judge found that the appellant had knowledge of the drugs found inside the box and was in possession of the drugs. The learned judge did not invoke the presumption under s. 37(d) nor under s. 37(da) of DDA. He relied on s. 8 of the EA in drawing the inference that the appellant had knowledge of the drugs based on his conduct of looking shocked and letting go of the box and tried to run away after SP7 had identified himself as a police officer. The learned judge, relying on s. 2 of DDA, found that the prosecution had made out a *prima facie* case of trafficking against the appellant and called him to enter his defence to the charge.

[24] It has been held that the reaction of an accused in looking stunned or shocked upon being approached by the police was admissible under s. 8 of EA since it has a direct bearing on the fact in issue as the drugs were found in the box. It was then incumbent on the accused to explain as required by s. 9 of the same Act (see *Parlan Dadeh v. PP* [2009] 1 CLJ 717; [2008] 6 MLJ 19). The question is, was the learned judge correct in drawing the inference that he did on the facts and circumstances of this case. Before we deal with this question, we will deal with other issues which will put this question in context.

- A [25] In a criminal trial for trafficking of drugs, the burden is on the prosecution to prove possession of the drugs before the issue of trafficking in the drugs can arise. To prove possession, the prosecution must establish that the accused person has custody or control of the drugs and he has the required knowledge of the thing possessed (see *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 1 MLJ 237).
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- C [26] It was the contention of the prosecution, which the learned judge accepted, that based on the waybill (P17A), custom duty invoice (P18) and invoice (P19), the appellant had ordered the bicycle parts from China. His name was stated in the three documents. He confirmed his name, signed the waybill and was alone when he acknowledged receipt of the box from SP6. When SP7 identified himself as police, the appellant looked shocked, let go of the box and tried to run away but was arrested. The learned judge found that the appellant had custody of the box. The appellant was brought to the police station with the box. SP7 opened the box and found four packets
- D containing crystalline substance concealed in the bicycle seats. From these facts, the learned judge inferred that the appellant knew and had knowledge of the drugs found inside the box and found that the appellant had possession of the drugs. The learned judge found that the appellant in carrying the box containing the drugs amounted to trafficking of the drugs as defined in s. 2 of DDA.
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- F [27] Based on the appeal record, the appellant received a telephone call from the courier company to take delivery of a box at Mentari Court which he did at the appointed time. The box, sent from China, stated that it contained bicycle parts. The appellant's name was set out in the waybill as the contact person with an address at Mentari Court. After SP6 had asked and confirmed the appellant's name, he asked the appellant to sign and acknowledge receipt of the box and handed the box to the appellant. SP7 and his team of policemen approached and identified themselves as policemen and arrested the appellant when he tried to run away.
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- H [28] The prosecution did not adduce evidence that the appellant had ordered the bicycle parts from China. This piece of evidence and the name of Steven only came about after the appellant was called to enter defence and after he had testified. To digress for a moment, the learned trial judge ruled that the defence was a mere denial and an afterthought because these facts/
- I issues were not raised nor put during the prosecution's case. With regard to the defence's case, it has been held that an appellant does not have a duty to disclose his defence and no adverse inference may be drawn against the appellant for remaining silent upon his arrest. Similarly, no adverse inference may be drawn against the appellant for not putting his defence during the prosecution's case, except that it goes to the weight of the defence and whether it raises any reasonable doubt on the prosecution's case - see *Raman Kunjiraman v. PP* [2014] 9 CLJ 915; [2018] Supp MLJ 86.

[29] Coming back to the issues, based on P17A, P18 and P19, the appellant was not stated as the person who ordered the bicycle parts or receiver of the box or of the bicycle parts whereas his name was put as the contact person with the address at Mentari Court. No evidence was led as to who put the appellant's name and address there (see *Sim Tiew Bee v. PP* [1973] 1 LNS 138; [1973] 2 MLJ 200). SP3 and SP4 had testified that the appellant did not stay at nor rent the address at Mentari Court. SP8 had testified that Mr Ong from the courier company contacted him about a suspicious box because the names of the shipper and receiver were incomplete. For the shipper, a name Eric was stated as the contact person with a phone number. Mr Ong told SP8 that he tried to contact Eric but was not successful. For the receiver, no name or company was stated. SP8 asked Mr Ong whether he scanned the box to find out the contents and Mr. Ong told him his company did not have any scanning machine. Mr Ong told SP8 that a week earlier, another box said to contain bicycle parts from China were found to contain dangerous drugs which were seized by the police. These were the basis for his suspicion which was why he contacted SP8. Mr Ong was not called to testify and what Mr Ong had said to SP8 was hearsay. However, what Mr Ong had said to SP8, which led to the police operation and arrest of the appellant, had an important bearing on the prosecution's narratives of this case.

[30] Counsel for the appellant submitted that the prosecution should have called Mr Ong as he was a crucial witness and in failing to do so, there were gaps in the prosecution's case. It was also submitted that the learned judge had therefore erred in failing to invoke the adverse inference under s. 114(g) of EA against the prosecution. The prosecution submitted that they had made every effort to trace Mr Ong but in vain because he was working in Singapore. SP9 had prepared a report (P38) setting out his efforts to trace Mr Ong.

[31] The appeal record showed that on 3 November 2014, SP6 delivered the box to the appellant in front of Mentari Court where the latter was arrested by SP7. The trial commenced on 17 April 2017. Based on P38, on 26 May 2017, in the midst of the trial, SP9 was only instructed to trace Mr Ong to come to court to testify. The role of Mr Ong was an issue during the trial which was apparent to the prosecution and the court. It was not in dispute that a statement was recorded from Mr Ong during police investigation into this case. Mr Ong was a material witness and the police should have required him to enter into a bond or served a subpoena on him to appear as a witness but only decided to trace him in the midst of the prosecution's case. No explanation was given why the police could not do so earlier.

[32] SP7 had testified that he opened the box in the police station and found several bicycle seats. On inspection, he found that the tapes on the plastic wrappings of these saddle seats had been opened or broken, the packets of

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A drugs were concealed under the seats and the plastic wrappings retaped. No
evidence was adduced as to who did it and whether it was done in China,
in Hong Kong, in transit or during the journey since the box was sent *via*
Cathay Pacific Airlines, or after the box arrived in Malaysia. Therefore
Mr Ong, the manager of the courier company which received the box sent
B from China and who alerted SP8 about the drugs in the box, was a material
witness and a vital link in the prosecution's case and should have been called
as such to explain.

[33] Further, after failing to contact Mr Ong in the midst of the trial, the
prosecution should have, but chose not to, produce the statement of Mr Ong
C as evidence under s. 32 of EA notwithstanding that the prosecution had
tendered P38. Again no explanation was given (see *PP v. Lam Peng Hoa &*
Anor [1996] 3 CLJ 747; [1996] 5 MLJ 405; *PP v. Lee Jun Ho & Ors* [2011]
D 6 MLJ 220). The learned judge did not deal with these issues in his grounds
of judgment although they were raised before him. We were of the view that
in not calling Mr Ong to testify, there were gaps and doubts in the
prosecution's case against the appellant and an adverse inference should have
been invoked against the prosecution under s. 114(g) of EA (see *Munusamy*
Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ
E 492; *Agbu Goodluck Ugochukwu lwn. PP* [2018] 2 CLJ 30; [2018] 3 MLJ 645).
We were therefore of the view that the learned judge had failed to appreciate
the evidence adduced and had misdirected himself on the evidence as such.

[34] On the finding by the learned judge that the appellant had knowledge
of the drugs in the box, it was an inference drawn based on the facts. We
emphasised the distinction between proved facts and inferences drawn from
F proved facts. On the facts before us, we were in as good a position as the trial
judge to draw the inference whether the appellant had knowledge of the
drugs. It is trite that proof of knowledge is very often a matter of inference.
The material from which the inference of knowledge can be drawn varies
from case to case. It is sufficient for the prosecution to prove facts from
G which it can be properly inferred that an accused person had the necessary
knowledge. The court is not concerned with the knowledge of a reasonable
man but is concerned with reasonable inferences to be drawn from a concrete
situation as disclosed in the evidence as it affects a particular person whose
knowledge is in issue (see *PP v. Chia Leong Foo* [2000] 4 CLJ 649;
[2000] 6 MLJ 705; *Parlan Dadeh v. PP* (*supra*)).

H [35] In this case the policemen, including SP6 and SP7, carrying out the
operation to deliver the box and to arrest the appellant were not in police
uniform. SP7 said that the appellant looked shocked but SP7's perception of
the appellant's facial expression looking shocked could be very subjective.
I To the appellant, these men who approached him were not in uniform and
complete strangers to him. It was natural for the appellant to react, to struggle

and tried to run not knowing their intentions although SP7 said that he identified themselves as police and tried to arrest him. It should be noted that these actions happened very fast, in the blink of an eye.

[36] Several inferences could be made from the facts, one of which was that he looked shocked and in trying to run away reflected a guilty mind. It could also be inferred that he was trying to flee from a group of strangers who approached him. We were of the view that the appellant looked shocked and tried to flee did not necessarily lead to the irresistible inference that he had knowledge of the drugs. We find support in our finding from the observation of the Federal Court in *PP v. Tan Tatt Eek* [2005] 4 CLJ 460; [2005] 2 MLJ 685 as follows:

To my mind the reaction of shock and the dropping of the bag exhibited by a person caught by surprise does not unequivocally show guilt. It could easily be the reaction of an innocent but surprised person. No firm inference can be drawn on the basis of such insufficient evident.

[37] At the material time, the appellant was not seen with the box or carrying the box until it was delivered to him by SP6. He only had custody of the box momentarily until he was arrested by SP7, after SP6 handed the box to him. This was not a case where the accused was seen carrying a bag containing drugs walking along a street and tried to run away when approached by the police as in the case of *Fakhrurrazi Hasan v. PP* [2017] 2 CLJ 125; [2018] Supp MLJ 1; or the drugs found inside a room or a house as in the case of *Agbu Goodluck Ugochukwu Iwn. PP (supra)*; or bolted while the police was searching for drugs in the vehicle but was arrested after a chase as in the case of *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113; [2018] Supp MLJ 280; or that the accused looked shocked or stunned when the drugs found were tucked away in the front of the jeans worn by the accused as in the case of *Parlan Dadeh v. PP (supra)*. In those cases, the courts drew the inference that the accused had the necessary knowledge of the drugs. The facts in those cases could be distinguished from the facts of this case.

[38] This was not a case where the appellant was in close proximity to or had access to the box. He never had access to the box. He was handed the box by SP6. This raised the question whether he was in physical possession of the box which contained the drugs. On the facts and circumstances of this case, the appellant could not be said to be in physical possession of the box. On this point, we were of the view that the learned judge had erred in finding that the appellant had physical possession or custody of the box and we took comfort in the judgment of Lord Morris in *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356 where he said:

If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession.

A [39] This then raised the question whether the appellant knew of the contents of the box since the prosecution did not lead any direct evidence that the appellant had ordered the bicycle parts and was the owner of the box and its contents. The courier company called the appellant to take delivery of the box because his name and phone number were on the box. The suspicion by
B the courier company then was that the box contained the drugs but mere or strong suspicion was not sufficient to convict the appellant. It was not in dispute that the box was taped and sent from China to the courier company in Malaysia for delivery which was opened by SP7 in the police station after SP6 delivered the box to the appellant. At the time the box was delivered
C to the appellant and he was arrested, he was not given a chance or opportunity for him to open and examine the contents of the box. There was no evidence led to show that the appellant had a suspicion but deliberately shut his eyes (see the judgment of Lord Reid in *Warner v. Metropolitan Police Commissioner (supra)*). Based on what we have said above in our judgment, there was no evidence that the appellant suspected or knew of the drugs in
D the box except that it contained bicycle parts sent from China.

[40] Where several inferences can be drawn from the proved facts and one inference which can be drawn in favour of the appellant, any benefit of doubt from that inference must be given to the appellant. On the facts and
E circumstances of the case, we were unanimous that the learned judge had erred in drawing the inference that the appellant had knowledge of the drugs in the box and that the appellant was in possession of the drugs. On the facts and our views on the case, it was not necessary for us to deal with the issue whether the appellant was an innocent carrier. For the reasons given, we found that it was not safe to convict the appellant under the charge.
F Therefore, we allowed the appellant's appeal and we set aside the order of conviction and sentence of the High Court and acquitted and discharged the appellant as per the charge.

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